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No. 257.

Brief of Atty for Def't in Error.

Filed April 30, 1900.

In the Supreme Court of the United States.

OCTOBER TERM, 1899.

COLUMBUS WINCHESTER MOTES, alias Chess Motes, Walter W. Motes, Jasper Robinson, John Littlepoha, and Mark Grant Blankenship, alias Dodge Blankenship alias Dodge Blankenship, plaintiffs in error,

vs.

THE UNITED STATES.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ALABAMA.

BRIEF FOR DEFENDANT IN ERROR.

JAMES E. BOYD,
Assistant Attorney-General.

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BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

The plaintiffs in error, Columbus Winchester Motes, alias Chess Motes, Walter W. Motes, Jasper Robinson, John Littlejohn, and Mark Grant Blankenship, alias

Dodge Blankenship, alias Dodger Blankenship, together with one William Robert Taylor, were indicted at September term, 1898, of the circuit court of the United States for the northern district of Alabama and were tried at the said term. William Robert Taylor entered a plea of guilty and the other defendants, having entered their plea of not guilty, were put upon their trial and the following verdict was rendered by the jury (Record, p. 36):

> We, the jury, find the defendants, Walter W. Motes, Columbus W. Motes, Jasper Robinson, John Littlejohn, and Mark Grant Blankenship, guilty as charged in the indictment. September 29, 1898. We, the jury, ask the mercy of the court for the four defendants, Walter W. Motes, Jasper Robinson, John Littlejohn, Mark Grant Blankenship, and especially for John Littlejohn and Jasper Robinson.

The judgment of the court was that each of the said persons convicted by the jury should be imprisoned in the penitentiary for the period of his natural life (record, p. 37).

(In order to save time and space, the full given names and aliases as they appear in the indictment will be omitted in the further statement and argument of the case.)

The indictment, which will be found on pages 1, 2, 3, 4, 5, 6, and 7 of the record, in substance charges that C. W. Motes, Walter W. Motes, William R. Taylor, Jasper Robinson, John Littlejohn, and Mark Grant Blankenship, in violation of section 5508 of the Revised Statutes of the United States, conspired to injure, oppress, threaten, and intimidate one W. A. Thompson, a citizen

of the United States, in the free exercise and enjoyment of a right and privilege secured to him by the Constitution and laws of the United States, namely, the right and privilege of reporting to a United States commissioner the fact that these said parties had violated the criminal laws of the United States by carrying on the business of illicit distillers of spirituous liquors; and also in the exercise of the right and privilege of reporting the said violation to a deputy collector of internal revenue of the United States. The indictment further charges that the said parties conspired to injure, oppress, threaten, and intimidate the said Thompson, because of the fact that he had exercised the right and privilege under the Constitution and laws of the United States of being a witness against these said parties upon a charge of a violation of the internal-revenue laws of the United States before the grand jury in the circuit court of the United States. It is charged severally in the counts of the indictment that in furtherance of the said conspiracy, and in carrying out the same, the said parties unlawfully, wilfully, premeditatedly, deliberately, and with malice aforethought, killed and murdered the said Thompson. For exceptions taken and noted during the trial and assignments of error thereon the case is brought to this court by writ of error for review, and the plaintiffs in error are the parties severally named in the indictment, with the exception of William Robert Taylor, who, as before stated, entered a plea of guilty before the trial commenced.

ARGUMENT.

The plaintiffs in error did not comply with section 997, Revised Statutes, nor rule 35 of the Supreme Court, and file with the petition for writ of error an assignment of errors in the court below, nor is there any assignment of errors incorporated in the transcript sent up or in the record as printed. I am left, therefore, to adopt the order of argument which is taken in the brief filed for plaintiffs in error.

I think, however, that the first question which arises in the case (which is one not discussed by the plaintiff in error) is whether, under the law, this case can be brought by writ of error direct from the circuit court in which it was tried to the Supreme Court, or whether the judgment pronounced by the circuit court on the verdict is that commanded by the law. The circuit court of appeals act (26 Stat., 827) provides for appeals or writs of error from the district courts or existing circuit courts direct to the Supreme Court in cases of conviction of a capital or otherwise infamous crime. But the words "or otherwise infamous" were subsequently, by act of January 20, 1897 (29 Stat., 492), stricken out, leaving the law to the effect that no such appeals or writs of error can be had except in cases of conviction of capital crime.

The indictment here is under section 5508 of the Revised Statutes, and the violation of the laws of the United States charged is a conspiracy to injure, oppress, threaten, and intimidate Thompson in the exercise and enjoyment of a right secured to him by the Constitution and laws of

the United States, and, secondly, to injure, oppress, threaten, or intimidate him because he had exercised a right or privilege secured to him by the Constitution and laws of the United States.

It is alleged further in the indictment that in carrying out the conspiracy to injure, etc., the conspirators unlawfully, willfully, premeditatedly, deliberately, and with malice aforethought killed and murdered Thompson. This last allegation is drafted under the provisions of section 5509 of the Revised Statutes, and relates solely to the measure of punishment.

The crime for which the parties charged could be convicted under this indictment is the conspiracy denounced by section 5508, but in case the indictment contains averments to that effect the jury is authorized to go further and find if the conspirators, in furtherance of the conspiracy, have committed acts which constitute a misdemeanor or felony under the laws of the State in which the conspiracy is alleged. In case of such finding the punishment prescribed for the conspiracy can extend to that provided by the State laws for the punishment of the misdemeanor or felony so found to have been committed. In order that I may be fully understood, I will reiterate that the provisions of section 5509 do not create any violation of the criminal laws of the United States, but simply provide for the punishment of offenders under section 5508 in case certain conditions are found to exist in connection with a conspiracy described in the latter section.

The circuit court of the United States sitting in the State of Alabama has no jurisdiction to indict or to try

a person for murder committed in said State; this jurisdiction belongs exclusively to the courts of the State of Alabama. The extent of the jurisdiction of the circuit court in a case like the one under consideration is to indict and try the parties for conspiracy and to ascertain if any act committed in furtherance of the conspiracy constitutes a felony or misdemeanor under the laws of the State in which the conspiracy is alleged. The finding of the jury as to the latter does not change the character of the crime only in so far as it relates to the punishment to be inflicted. The crime is still that of conspiracy under section 5508, and the additional finding of the jury simply has the effect of empowering the court to go beyond the punishment prescribed in section 5508 and inflict such as is provided by a State law. Now, apply this to the case here. The plaintiffs in error were indicted for a conspiracy, a crime under the laws of the United States; but in order to determine the punishment in case of conviction, it is charged that in the act of committing the crime of conspiracy they also committed murder, which is a felony under the laws of Alabama. Therefore, if the jury found by the verdict that the parties were guilty as charged in the indictment, the effect was to convict for conspiracy, the punishment for which is that attaching to the crime of murder under the State laws of Alabama.

Conspiracy under section 5508, Revised Statutes, is not a capital crime. "A capital crime," says Bouvier in his Law Dictionary, "is one for which the punishment of death is inflicted;" and he also defines "capital punishment" to

be "the punishment of death." The American and English Encyclopedia of Law, vol. 2, page 728, under the head of "Capital," in so far as it relates to crime, gives the definition "punishable with death; affecting life." The crime is therefore not capital unless it is one in which the death penalty may be inflicted.

It will be observed that in providing for writ of error or appeal from the district and circuit courts to the Supreme Court the right is made to turn upon *the conviction* and not upon the charge in the indictment, for, as I have before stated, the law as enacted in the circuit court of appeals act and afterwards amended reads as follows:

"In cases of *conviction* of a capital crime." A *conviction* in a judicial proceeding is an adjudication that the person accused is guilty. "The word conviction ordinarily signifies the finding of a jury by verdict that the prisoner is guilty." (American and English Encyclopedia of Law, vol. 7, p. 497.) In the notes under the definition above given is cited a decision to the effect that "a man is convicted when he is found guilty or confesses the crime."

The decisions are all to the effect that in order to constitute a conviction the accused must be found guilty by the verdict of a jury or confess his guilt. (See cases cited in American and English Encyclopedia of Law, vol. 7, under head of "Conviction.") In *United States* v. *Gibert*, 2 Sumn. (U. S.), 19 (also reported in 25 Fed. Cas., 1287), it is held that a verdict or confession of guilt is a conviction. On page 1295, 25 Fed. Cas., in rendering

the opinion in the Gibert case, Mr. Justice Story says: "Conviction does not mean the judgment passed upon a verdict; '*but if the jury find him (the party) guilty, he is then said to be convicted of the crime whereof he stands indicted.*'"

So, then, it depends in this case upon the question as to whether or not the plaintiffs in error were convicted of a capital crime—that is, Was there a conviction of a crime which, by virtue of such conviction, was punishable with death? If not, then, under the law which authorizes a writ of error direct to the Supreme Court only in cases of conviction of capital crime, this writ of error will not lie.

This brings us then to consider the character of the conviction by the verdict of the jury in this case, and the first question which seems to occur is as to whether the statute law of the State of Alabama relative to indictments and trials for murder has any application to this case. In order to lay the point fully before the court, I give the following sections from the Code of Alabama, Vol. 2 (Crim.):

> SEC. 4854. Every homicide, perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious and premeditated killing; or committed in the perpetration of, or the attempt to perpetrate, any arson, rape, robbery, or burglary, or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed; or perpetrated by any act greatly dangerous to the lives of others, and evidencing a depraved mind regardless of human life, although without any preconceived purpose to

deprive any particular person of life, is murder in the first degree; and every other homicide, committed under such circumstances as would have constituted murder at common law, is murder in the second degree.

SEC. 4857. When the jury find the defendant guilty under an indictment for murder, they must ascertain, by their verdict, whether it is murder in the first or the second degree; but if the defendant on arraignment confesses his guilt, the court must proceed to determine the degree of the crime, by the verdict of a jury, upon an examination of the testimony, and pass sentence accordingly.

SEC. 4858. Any person, who is guilty of murder in the first degree, must, on conviction, suffer death, or imprisonment in the penitentiary for life, at the discretion of the jury; and any person, who is guilty of murder in the second degree, must, on conviction, be imprisoned in the penitentiary for not less than ten years, at the discretion of the jury.

By section 4854 homicides which constitute murder are divided into murder of the first degree and murder of the second degree; and section 5847 makes it incumbent upon the jury finding a defendant guilty under an indictment for murder to ascertain by their verdict whether it is murder in the first or murder in the second degree. Section 4858 defines the punishment for murder in the first degree and for murder in the second degree, that for murder in the first degree being death or imprisonment in the penitentiary for life, at the discretion of the jury, and for the second degree, imprisonment in the penitentiary for not less than ten years, at the discretion of the jury. If, therefore, under the Alabama

law, a person is convicted of murder in the first degree, the punishment is death, unless the jury in the exercise of the discretion conferred upon it by the statute elects to designate imprisonment in the penitentiary for life.

Proceeding on the assumption that punishment for a felony under the laws of Alabama is to be the measure of punishment for a crime against the United States, and that to ascertain the extent of punishment for such felony the trial must follow the requirements of the Alabama statute, we come to the point of inquiry as to the effect of the verdict of the jury rendered in this case.

The verdict is given before in the statement of the case, but in order to have it immediately before the court I reproduce it from page 36 of the record:

> We, the jury, find the defendants, Walter W. Motes, Columbus W. Motes, Jasper Robinson, John Littlejohn, and Mark Grant Blankenship, guilty as charged in the indictment. September 29, 1898. We, the jury, ask the mercy of the court for the four defendants, Walter W. Motes, Jasper Robinson, John Littlejohn, Mark Grant Blankenship, and especially for John Littlejohn and Jasper Robinson.

As before stated, the indictment charges the parties named with conspiracy under section 5508, Revised Statutes, to injure W. A. Thompson in the enjoyment of a right and privilege under the Constitution and laws of the United States, and that, in furtherance of the conspiracy, they *unlawfully, willfully, premeditatedly, deliberately, and with malice aforethought*, killed and murdered the said W. A. Thompson. The jury by their verdict said that these parties were guilty as charged in the in-

dictment; that is, that they conspired to injure Thompson in violation of section 5508, Revised Statutes, and that in the act of carrying out the conspiracy they murdered him. Upon that verdict the court sentenced the parties severally to imprisonment in the penitentiary for life. If such was the judgment which the court was required to pass under the verdict, then I contend that a writ of error could not be taken directly to the Supreme Court; and this upon the ground that if, by the verdict, the court was precluded from passing the death sentence, then it was not a case in which the punishment of death could be inflicted and was therefore not a conviction of a capital crime.

The jury did not follow the requirements of section 4857 of the Alabama statutes and ascertain whether the parties had committed murder in the first or in the second degree, nor did the jury exercise the discretion conferred by section 4858 and prescribe imprisonment in the penitentiary for life in lieu of the death penalty. The indictment alleges sufficient facts to constitute murder in the first degree, and when the jury returned a verdict of guilty as charged in the indictment they said in effect that these allegations were true. Then, how did the jury qualify the verdict so as to relieve the court of the duty of entering judgment that the convicted parties should be put to death, unless the recommendation for mercy, which is a part of the verdict, be construed into a substantial compliance with the requirements of the statute making it incumbent upon the jury by their verdict to determine as to whether

capital punishment or imprisonment for life shall be inflicted? If we take this view of it, then the result is that four of the parties, namely, Walter W. Motes, Jasper Robinson, John Littlejohn, and Mark Blankenship, should have been sentenced to imprisonment for life, and Columbus W. Motes, who was not recommended for mercy, should have been sentenced to death. In such case, the last named would be entitled under the law to sue out a writ of error directly to the Supreme Court, because his conviction would be that of a capital crime. The others would not be entitled to come directly to the Supreme Court, because the punishment of death could not be inflicted so far as they are concerned.

If, however, the statute law of Alabama relative to the degrees of murder and the duties of juries in murder trials does not apply in this case, then the question arises whether sections 5508 and 5509 of the Revised Statutes, taken together, make conspiracy in which murder is committed a capital felony under the laws of the United States. In order to have the question immediately before us, I copy the two sections referred to:

> SEC. 5508. If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right so secured, they shall be fined not more than $5,000 and imprisonment not more than ten years; and shall, moreover, be thereafter ineligible to any office, or place of

honor, profit, or trust created by the Constitution or laws of the United States.

SEC. 5509. If in the act of violating any provision in either of the two preceding sections any other felony or misdemeanor be committed, the offender shall be punished for the same with such punishment as is attached to such felony or misdemeanor by the laws of the State in which the offense is committed.

These two statutes together, in case of conspiracy and murder, appear to be capable of the following construction: If two or more persons conspire to injure a citizen in the enjoyment of a right or privilege under the Constitution and laws of the United States, or to injure him because he has exercised such right, and in furtherance of such conspiracy shall commit the crime of murder, such person shall, in case of conviction, be punished with such punishment as is attached to murder in the State in which the offense is committed.

If this is a proper construction of the sections, then conspiracy and murder, in a State where the punishment of murder is death, constitute a capital crime under the laws of the United States, and in a State where capital punishment is not inflicted for murder, the crime of conspiracy and murder under the United States statutes would not be capital. In Alabama, murder in the first degree is punishable with death. The charge in the indictment in our case is conspiracy and murder, and the averments as to the murder follow the Alabama statute and state facts sufficient to charge murder in the first degree, and are also sufficient to charge murder at common law.

If, therefore, the duty of specifying by the verdict the punishment to be inflicted, as prescribed by the Alabama statute, did not devolve upon a jury sitting in the Federal court, there is but one view, it seems to me, to take of the situation, and that is, that the verdict as rendered by the jury convicted the parties indicted of a crime which is punishable under the laws of Alabama and also the laws of the United States with death, and it was the duty of the court, upon the rendition of this verdict, to pass judgment accordingly. The jury did not relieve the court of this duty by qualifying the verdict, nor authorize it to pass sentence for a less punishment. If this position be tenable, then the proper judgment in this case has not been passed upon the plaintiffs in error by the trial court, and the case should be remanded, with directions to enter judgment pronouncing the death penalty, as required by law.

I am led to present these views to the court because I do not think the judgment of the court below in this case is that which the law demands and the plaintiffs in error deserve. The killing of Thompson, according to the evidence for the prosecution and the admission of Columbus W. Motes, one of the prisoners who was examined on the trial as a witness for his codefendants (see record, pp. 25, 26), was a premeditated, deliberate, and cold-blooded murder—a murder without a single mitigating circumstance. Thompson had simply performed a duty devolving on him as a law-abiding citizen by reporting a violation of the criminal laws of the United States. He had obeyed the mandate of the law, and had testified before a grand jury as a witness against

persons who were charged with crime. Because of this action on the part of Thompson, his death was decreed by the gang of ruffians against whom his testimony was directed, and he was waylaid by them and murdered in a most cowardly manner. The purpose of the conspirators in taking the life of Thompson was, no doubt, two-fold—first, to be rid of his evidence in the indictment against them, and, second, to deter other citizens in that community from reporting violations of the internal-revenue laws, or testifying against persons charged with such violations.

Concluding upon these points, I wish to restate the position that if the verdict of the jury in this case took away from the court the right to pronounce the death sentence, then there was not a conviction of a capital crime and no writ of error could be brought directly to the Supreme Court, and the writ of error here ought to be dismissed. On the other hand, if the indictment charges a capital crime; that is, a conspiracy in which a murder was committed by the accused—a murder in the first degree under the statutes of Alabama, and a murder at common law, for both of which death is the punishment prescribed by law, the verdict being a general one of "guilty as charged in the indictment," the proper sentence of the court upon the verdict of guilty was the punishment of death. If the jury had qualified the verdict as provided by the act of January 15, 1897 (29 Stat., 487), by adding "without capital punishment," it might have been held sufficient to authorize the judgment of imprisonment for life; and yet, if the crime is conspiracy, to be punished as murder, the provisions of

that act would not apply, because they are confined to murder and rape. But this view of it need not be considered, for the jury did not undertake to qualify the verdict. They only added a recommendation for mercy as to four of the defendants.

The power of this court to remand a case for proper judgment is well settled. (*Ballew* v. *United States*, 160 U. S., 187, and cases cited in the opinion.)

POINTS MADE IN BRIEF OF PLAINTIFFS IN ERROR.

I now come to the questions raised by exceptions taken on the trial and assignments of error based thereon, discussed in the brief filed by counsel for plaintiffs in error.

I and II. *Challenges of jurors.*—The contention on the part of the plaintiffs in error is that they were entitled to the number of peremptory challenges in the selection of the jury as provided by the criminal code of Alabama.

I do not think that this question requires lengthy argument on the part of the United States. The number of peremptory challenges allowed by the court (record, pp. 14, 15) was five for the Government and twenty for the defendants. Section 819, Revised Statutes, contains the following provisions:

> When the offense charged is treason or a capital offense, the defendant shall be entitled to twenty and the United States to five peremptory challenges. * * * and in all cases where there are several defendants or several plaintiffs, the parties on each side shall be deemed a single party for the purposes of all challenges under this section.

The indictment in this case, as before insisted, charges a capital offense, and the court followed literally the law with regard to peremptory challenges. The counsel for plaintiffs in error takes the position that the challenges should have been regulated by the laws of Alabama, and, further, that the conspiracy charged in the indictment, in the first counts thereof, is not a capital offense.

I will not take the time of the court to discuss these questions further than to direct attention to the provisions of section 819 above quoted and to the offense charged in the indictment.

III, IV, V, VI, VII, and VIII. *Admission of testimony tending to show that plaintiffs in error had operated an illicit distillery.*

The theory of the prosecution was that the plaintiffs in error conspired to injure Thompson because he had reported them for illicit distilling and had also become a witness against them before the grand jury and was a witness indorsed upon an indictment pending against them for carrying on the business of distillers of spirituous liquors in violation of the laws of the United States. Evidence going to prove that the parties were guilty of the offense for which Thompson had reported them, and of which they stood charged in an indictment on which he was a witness, was relevant in order to show a motive for the commission of the crime for which they were on trial. In criminal cases "the prosecution has the right to offer evidence which tends to prove the motive in a defendant for the commission of the crime for which he is indicted." (American and English Encyclopedia of

Law, vol. 15, citations under note 11, page 937.) "Evidence is not incompetent when it is introduced for the purpose of showing a motive for the crime charged, because it may tend to show that the accused is guilty of another offense than the one for which he is indicted." (American and English Encyclopedia of Law, vol 15, page 938.) This evidence was competent because it went directly to the motive which instigated the plaintiffs in error in the commission of the offense for which they were on trial. Thompson had reported them for illicit distilling. He was a witness on an indictment which was pending against them in the United States court for illicit distilling. It was, therefore, competent to show the fact that these parties had engaged in illicit distilling, and this at once furnished a motive for the conspiracy against Thompson.

IX and X. *The admission as evidence on the trial of the testimony given by William Robert Taylor against the plaintiffs in error upon the preliminary trial before United States Commissioner Wilson in this case.*

Upon complaint duly made a warrant was issued in August, 1898, for the arrest of William Robert Taylor, Columbus W. Motes, John Littlejohn, and Dodge Blankenship, on the charge of conspiracy and the murder of W. A. Thompson, and on the 19th day of August, 1898, the preliminary hearing was in progress before United States Commissioner Wilson, before whom the warrant had been returned. William Robert Taylor, one of the accused, voluntarily became a witness for the prosecution and was examined. During his examination he implicated in the crime Columbus W. Motes, John Littlejohn,

and Dodge Blankenship, who were then under arrest and present, and also implicated Walter W. Motes and Jasper Robinson, who were present, having been brought to the hearing as witnesses for the Government. Thereupon Walter W. Motes and Jasper Robinson were arrested and the examination of Taylor as a witness proceeded with. Counsel for C. W. Motes, Littlejohn, and Blankenship was present and cross-examined Taylor; and Walter W. Motes and Robinson were also present during this cross-examination and had the opportunity themselves to cross-examine Taylor. (See evidence of B. W. Bell, Record, pp. 17, 18, and testimony of H. A. Wilson, commissioner, Record, pp. 18, 19.) The evidence of William Robert Taylor taken before the commissioner was reduced to writing and signed by him, and will be found in the record beginning on page 19. When the case came on for trial in the circuit court, it was upon the indictment against C. W. Motes, Walter W. Motes, William R. Taylor, Jasper Robinson, John Littlejohn, and Mark Blankenship. When the parties were brought in to be arraigned, William Robert Taylor entered a plea of guilty and the others, severally, the plea of not guilty. (Record, p. 30.) The trial was then proceeded with as to the persons named in the indictment who had entered the plea of not guilty. William Robert Taylor was under subpoena as a witness for the prosecution and was also in the list of witnesses for the prosecution served upon the plaintiffs in error (record, pp. 7, 8). Taylor was released from prison and was put in charge of a man by the name of Ed. May, with instructions to let Taylor stay at the hotel at night

with his family. It appears that Taylor remained at the hotel two nights and then absconded, and, when called as a witness, he failed to respond. Efforts were made through the United States marshal and his deputies, as well as the State officers, to ascertain the wherabouts of Taylor and produce him in court, but he could not be found. See testimony before the court of United States marshal and deputy sheriff (record, p. 18); also testimony of H. A. Wilson as to circumstances under which Taylor was examined on preliminary hearing beginning on page 18 of record.

The United States attorney then offered to introduce the statement of the testimony of William Robert Taylor taken before the commissioner, as evidence for the prosecution. Objection by counsel for plaintiffs in error. The court ruled the testimony competent, and an exception was noted. As to the admissibility of this evidence I content myself with citing authorities which are furnished me by the United States attorney who represented the prosecution in the trial. (*Lowe* v. *State*, 86 Ala., 51; *Pruitt* v. *State*, 92 Ala., 41; *Reynolds* v. *United States*, 98 U. S., 145; Wharton's Crim. Ev., 8th ed., sec. 229.) From the testimony of the officers produced by the United States attorney, it appears that Taylor absconded, and after the exercise of due diligence he could not be found within the district. It is insisted that under these circumstances the court had a right to assume that he was beyond its jurisdiction and indefinitely absent therefrom.

XI. *Objection to the testimony of Mary Taylor to the*

effect that she had heard Columbus W. Motes and William Robert Taylor agree to kill Thompson.

The objection is based upon the ground that Mary Taylor is the wife of William Robert Taylor, and therefore incompetent to testify against his accomplices.

Taylor had already entered his plea of guilty, and the testimony of his wife could in no way affect him. She was not a witness against her husband. It is true that the general rule is that on a trial for conspiracy the wife of one of the defendants is not allowed to testify against one of the others as to any act done by him in furtherance of the common design, if there be any evidence connecting the husband with the defendants in the general conspiracy. It is obvious that this rule is not intended to apply in a case like the present, for the husband had, himself, already become a witness, had made a confession admitting his own guilt, and had gone further and entered a plea of guilty to the indictment. He was not on trial at all, and nothing that the wife could have said would have had any bearing so far as his guilt or innocence was concerned. "The rule of exclusion is only to be applied to cases in which the interest of the husband is to be affected by the testimony of the wife." (Wharton's Crim. Ev., 8th ed., secs. 390, 391, 392.)

XII. *Exception because the jury were allowed to examine certain substances alleged to be human blood and brains.*

A shoe was produced on the trial which was shown to be one worn by Columbus W. Motes about the time Thompson was killed, and afterwards found near Motes's house. On the shoe were certain deposits which Dr.

J. E. Pearson, an expert witness for the prosecution, testified were particles of human blood and brains. The district attorney then offered to let the jury examine the particles on the shoe through a microscope, which was admitted by the court and excepted to by the plaintiffs in error. It is a settled rule of law that it is competent to introduce on a trial, for inspection by the jury, all instruments by which an offense is alleged to have been committed; all clothes of parties from which inferences may be drawn, and all materials in any way a part of the res gestæ. (Wharton's Crim. Ev., 8th ed., secs. 311, 312, et seq.) The shoe had been identified as one worn by Motes. The expert witness had testified that the particles found upon it were human blood and brains. Under these circumstances it was competent for the jury to have the benefit of an inspection of the shoe and the particles found upon it.

XIII. *Objection to allowing the district attorney to cross-examine plaintiffs in error when on the stand as witnesses for themselves as to whether or not they had been guilty of illicit distilling previous to the time Thompson was killed.*

I do not think this proposition needs argument. The plaintiffs in error went upon the stand voluntarily as witnesses and as such they were subject to the ordinary rules of cross-examination. The district attorney had the right to test their credibility by inquiring of them as to their previous conduct. If his interrogatories were such as tended to criminate them, they had the constitutional right to decline to answer on that ground.

XIV. *Error is assigned because the court overruled the motion for arrest of judgment.*

The motion in arrest was based upon the same grounds as are assigned for error and is simply a reiteration of the several questions involved in the case here.

XV–XXVIII. *Exceptions 25 to 28, inclusive, are based upon requests for special instructions to the jury.*

No part of the charge of the court to the jury is given in the record, so it is impossible to know here what the charge was. I have the right to assume that the court referred in some way in its charge to the jury to the several requests made by the plaintiffs in error, and in preparing the bill of exceptions it would have been fair to the defendant in error to have given what the court did charge relative to the several points involved in the requests for special instruction. Not only is the record silent as to the judge's charge, but counsel for plaintiffs in error does not produce any part of it in his brief of argument. We are, therefore, confronted by a number of abstract propositions, the bulk of which are wholly untenable as propositions of law, without an opportunity to examine the charge of the court and see if it did not declare the law in this case properly.

There are four of the special requests for instructions, namely, 20, 21, 26, and 27, which refer to the citizenship of Thompson, the deceased. The last two seem to be based upon conditions concerning which there was no evidence. I do not find in the record any testimony that Thompson had ever been convicted of any offense whatever, either against the United States or any State in the Union, or that he had been guilty of any act which deprived him of his rights and privileges under the Con-

stitution and laws of the United States. My contention is that if Thompson was beyond the pale of protection of the laws of the United States, such was a matter of defense, and the burden was upon the plaintiffs in error to show it.

XXIX. The twenty-ninth assignment of error is as follows: "The sentence is illegal."

I think that there may be something in this assignment, because, according to a view which I have before presented, there is a question as to whether the court could sentence the plaintiffs in error for life, instead of inflicting the punishment of death. If the court did not enter the judgment which the law required, then it is true that the sentence is illegal.

There is one phase of this case which I must admit is somewhat novel, and that is in relation to Columbus W. Motes, one of the plaintiffs in error. Whatever may have been the result as to the other plaintiffs in error of any error committed during the trial, either in the admission of testimony or the charge to the jury, it is impossible for me to see how any right which Columbus W. Motes was entitled to could be at all affected. The jury was not compelled to rely upon the testimony of a single witness aside from Columbus W. Motes himself in order to render a verdict of guilty as to him. He went voluntarily upon the stand as a witness for the defendants in the trial, and I give his testimony in full as taken from the record, beginning on page 25:

> My name is Columbus W. Motes; I am about 30 years old; I know the defendants, who are on trial for the murder of W. A. Thompson; I knew Thomp-

son, and know when and where he was killed; I also know who killed him.

He was killed on March 14 last, near his home, by myself and William Robert Taylor. No other person had anything whatever to do with it. I went to Taylor's house on March 13, 1898, just after he had returned from Birmingham, where he had been attending the United States court as defendant. We were both under indictment in the United States court at Birmingham for illicit distilling. Taylor attended court and I did not. W. A. Thompson was a witness against both of us, but I did not know who reported us. Taylor told me on the 13th of March, the day he got home from the United States court at Birmingham, that he got our cases continued on March 12, 1898, until the next term of the court. We then and there agreed to kill Thompson to keep him from appearing as a witness against us at the next term of the court. We agreed to kill him on the next day as he came from Sylacauga, so the neighbors would think he was killed by Dodge Blankenship and Ad Smith, who only a few days before that time had been arrested and bound over for illicit distilling.

We took my gun, a rifle, and went to the place where we knew Thompson would pass and waited until he came along. Taylor shot him three times with the rifle. I was watching, according to the agreement between us, to see if any person saw us. The third shot is the one that killed him. The bullet entered his forehead. After we killed him, which was about the middle of the evening, we got his money out of his pockets, $18 all in two-dollar bills, and the next morning we hid it in a tree near Taylor's house.

Neither John Littlejohn, Dodge Blankenship, Walter Motes, or Jasper knew anything about our

plans to kill Thompson, were not present when he was killed, and had nothing whatever to do with the murder.

Now, what difference does it make, so far as this plaintiff in error is concerned, as to the testimony introduced on the part of the prosecution, whether it was competent or incompetent; because he admits in his own sworn statement, when being examined as a voluntary witness, that he and Taylor entered into the conspiracy to murder Thompson and that they did murder him. In this situation the court was not required to give the jury any special instructions as to Columbus W. Motes, based upon exceptions to testimony of other witnesses, or any special instructions upon particular principles of the law as applicable to his case. The court would have committed no error if it had said to the jury, that if they believed the testimony of Motes himself, he was guilty as charged in the indictment.

JAS. E. BOYD,
Assistant Attorney-General.

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